Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1979**

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**NO. 79-902**

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HIRSCH FRIEDMAN,

*Petitioner,*

vs.

MARY ELLEN HARBOLD,

*Respondent.*

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## RESPONSE OF THE HONORABLE WILLIAM T. DEAN TO PETITIONER'S WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

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| HIRSCH FRIEDMAN, | ) | |
| *Petitioner,* | ) | CIVIL ACTION |
| vs. | ) | |
| | ) | FILE NO. 79-902 |
| MARY ELLEN HARBOLD, | ) | |
| *Respondent.* | ) | |

## STATEMENT OF THE CASE

The within response in opposition to Petitioner Friedman's Petition for Writ of Certiorari is respectfully submitted on behalf of The Honorable William T. Dean, Chief Judge of the Superior Courts, Stone Mountain Judicial Circuit, Georgia, the Trial Judge issuing the contempt judgment against Petitioner forming the basis of the instant appeal.

Respondent Dean was not made a party to the appeal of his order to the Georgia Court of Appeals and has thus received no notice as to the status of the appellate proceedings since the date of the entry of the Trial Court's contempt judgment on June 16, 1978. Apparently, Petitioner Friedman has only served notice on counsel for the Trial Court Plaintiff, Attorney Lawrence S. Burnat. As stated in Petitioner's statement of the case, the original law suit was one involving a damage claim arising out of a dog bite, the trial Plaintiff thus had no real interest in the outcome of the contempt appeal. It was not until February 8, 1980, when Mr. Burnat notified the DeKalb County District Attorney's office of the request for a response

received from Michael Rodak, Jr., Clerk of the United States Supreme Court, by letter dated January 28, 1980, that Judge Dean became aware of the Petition for Writ of Certiorari that has been filed in this Court.

## ARGUMENT

### I.

### PETITIONER IS NOT ENTITLED TO A HEARING ON CONTEMPT BEFORE A JUDGE OTHER THAN THE JUDGE ISSUING THE CONTEMPT CITATION WHERE NO SHOWING HAS BEEN MADE OF PERSONAL BIAS AGAINST THE PETITIONER OR THAT THE JUDGE WAS "PERSONALLY EMBROILED" WITH PETITIONER.

As set out in the Trial Court's order dated June 16, 1978, the Court based its contempt judgment against Petitioner upon Petitioner's statements and actions directed toward opposing Counsel and other witnesses during the trial. There is nothing contained in the record and no facts exist which in any way suggest that Petitioner's contempt conviction was based upon conduct involving Judge Dean personally.

Petitioner has erroneously interpreted this Court's ruling in *Mayberry v. Pennsylvania,* 400 U.S. 455, 91 S. Ct. 499 (1971) and *Offutt v. United States,* 348 U.S. 11, 75 S. Ct. 11 (1954). Both of these cases involved personal attacks by the contemptor upon the trial judge and are readily distinguished from the facts in the present case. *Mayberry* and *Offutt* only set our the standard that, where a judge has become "personally embroiled" with counsel in a trial, then due process dictates that the judge disqualify himself from presiding at the post-trial contempt hearing. *Mayberry v. Pennsylvania,* Supra, 400 U.S. at 465, 466.

Petitioner in the present action has not even contended that the trial Judge was personally involved in the contemptuous conduct and, as such, should have disqualified himself. Rather,





Petitioner attempts to argue an across-the-board theory of disqualification which would prohibit any trial judge from sitting at the hearing on the contempt committed in his courtroom. Such an argument is contrary to the decisions of this Court as well as numerous circuit courts and would appear to impugn the impartiality of all trial judges as well as their ability to deal fairly with contemptuous conduct committed in their presence.

The principal of law as stated in the case of *Unger v. Sarafite,* 376 U.S. 575, 84 S. Ct. 841 (1964), is controlling based upon the facts in the present case. In *Unger,* this Court reviewed the record of the trial court below and determined that there was nothing contained therein which would indicate that the trail judge had "permitted himself to become personally involved with Petitioner." *Unger v. Sarafite,* Supra, 376 U.S. at 585. As stated by this Court:

> "We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions." 376 U.S. at 584.

There is no evidence in this case of any personal bias of Judge Dean against the Petitioner or of any involvement of the Judge in the controversy itself. Petitioner was cited for contempt based upon his "disrespectful conduct" to the opposing attorney and other witnesses in the case. Petitioner was afforded a separate contempt hearing which fully comported with all requirements of due process, including the right to notice, counsel and to present and cross examine witnesses. There is nothing to the contrary expressed in the decision of the Georgia Court of Appeals cited by Petitioner, *Farmer v. Holton,* 146 Ga. App. 102, 245 S.E. 2nd 457 (1978). *Farmer,* as did *Mayberry* and *Offutt,* involved contumacious conduct directed toward the judge personally.

The Georgia Court of Appeals correctly stated the rule of law applicable to this case when it held that there was no merit in

Petitioner's claim that his trial for contempt violated the due process clause of the 14th amendment. As held by this Court and the 3rd, 4th and 7th Circuit Courts of Appeals, where an examination of the record does not indicate that the trial judge became "personally embroiled" in a battle with the petitioner, the removal of the contempt proceedings to a different judge is unnecessary. *Unger v. Sarafite,* Supra; *United States v. Prewitt,* 553 F. 2d 1082, 1088 (7th Cir.1977); *United States v. Marx,* 553 F. 2d 874, 877 (4th Cir.1977); *Com. of Pa. v. L. U., 542, Intern, U. of Op. Engrs.,* 552 F. 2d 498, 514 (3rd Cir.1977); *Paul v. Pleasants,* 551 F. 2d 575, 579 (4th Cir.1977).

Further, and is noted by the Georgia Court of Appeals in its decision, this constitutional question was not raised by Petitioner in the trial court so as to afford the trial judge an opportunity to pass on it, but was first raised on appeal. Where, as here, the "question of the constitutionality of the proceeding or as to the denial of due process of law with regard to the contemptor" was not raised before the trial judge, "such question cannot now be raised for the first time" on appeal. *Garland v. State of Georgia,* 101 Ga. App. 395, 400 (1960).

II.

PLAINTIFF WAS PROPERLY HELD IN CONTEMPT FOR HIS MISBEHAVIOR IN THE PRESENCE OF THE COURT UNDER THE PROVISIONS OF GA. CODE ANN §24-105.

Ga. Code Ann §24-105 provides in part:

> "The powers of the several courts to issue attachments and inflict summary punishment for contempt of court shall extend only to cases of misbehavior of *any person or persons in the presence of said courts* or so near thereto as to obstruct the administration of justice ..." (emphasis added).

As stated in Judge Dean's order of June 15, 1978, Petitioner was held in contempt for his "impertinent, disrespectful, rude



and insulting behavior" while testifying as a witness and defendant. (Appendix A, attached hereto). There is nothing contained in the record or the order of the Court to support Petitioner's contention that the Court held him in contempt based upon his misbehavior as an officer of the court in his official transactions.

While, on the one hand pointing out to this Court that Petitioner "by profession is a practicing attorney and a member in good standing of the State Bar of Georgia" (Petitioner's Writ of Certiorari, Page 5), Petitioner would, on the other hand, argue that he sheds any additional responsibilities or duties resulting from his position as an attorney in respect to deference to the Court and its judicial officers while he is testifying as a witness. There is nothing in the record to suggest that the trial court singled out Petitioner for contempt solely because of his status as an attorney at law. The Court only noted, in weighing the facts and circumstances surrounding the judgment of contempt, that Petitioner, as an attorney, had knowledge that other individuals may not have had and, thus, the actions on his part were of more concern to the Court.

The Court of Appeals correctly determined that Petitioner here, as an attorney and officer of the court, does not shed his duties when he becomes a witness in his own behalf. *Friedman v. Harbold,* 150 Ga. App. 482 (1979); *Cohran v. Sosebee,* 120 Ga. App. 115 (1969). The Georgia Code and Canons of Ethics for lawyers demand a high degree of responsibility from attorneys when dealing with the court and its officers, and such statutes are applicable to govern the actions of attorneys in whatever capacity they may function. Ga. Code Ann §9-601(1); Ga. Code Ann Tit. 9 appen. EC 1-5.

Petitioner's argument that he should not be held to the legal and ethical standards of conduct prescribed for attorneys in the State of Georgia, when functioning as a witness in a court of law, is a disservice to himself as well as to the entire legal profession.

## III.

## PETITIONER HAS NO CONSTITUTIONALLY PROTECTED RIGHT TO ENGAGE IN DISRESPECTFUL AND INSULTING BEHAVIOR IN A COURT OF LAW AND THE TRIAL COURT CORRECTLY HELD SUCH CONDUCT TO BE CONTEMPTUOUS.

Petitioner argues that he has a constitutional right to call opposing counsel and witnesses liars in open court, and further states that "(n)o one disputes the fact that the trial was an orderly one and that Petitioner was charged with contempt for an isolated statement ..." (Petitioner's Writ of Certiorari, Page 10-11). Both of these statements are in error. The Georgia appellate courts have correctly laid down the rule that:

> " 'The question, whether there is a contempt of court, and the question whether, if there is one, it ought to be punished or ought to be excused, and other questions, as to contempt, are questions for the discretion and judgment of the court ... Whatever decision then, it comes to, on such questions, ought to be final, at least, unless there is something in the decision to show a most flagrant abuse of the discretion.' ***Beebe v. Smith,*** 76 Ga. App. 391, 410 (1948)." ***Cabot v. Yarborough,*** 27 Ga. 476, 478.
>
> "On the hearing of contempt proceedings, the trial judge is the trior of the issue and is vested with broad discretion where the evidence on the issue of the contempt is conflicting." ***Yancy v. Mills,*** 210 Ga. 684, 685, 82 S.E. 2d 505 (1954); accord, ***Farmer v. Holton,*** Supra, 146 Ga. App. at 106.

The reason for this wide discretion which is vested in the trial judge is that the judge alone has the opportunity to observe the speech, manner, tone and general demeanor used by counsel forming the basis of the contempt. Such is the fact in the instant case. While Petitioner would contend that the trial was an orderly one and his only contemptuous behaviour consisted of the subject statement to opposing counsel, such conclusion is



not supported by the record and, in fact, is erroneous. If a transcript of the entire proceedings were available for review, it would be apparent that Petitioner's behavior and manner throughout the trial were rude and disrespectful to the parties in the action.

It is this opportunity by the trial court to observe the total behavior, tone and actions of an attorney, that is not available to an appellate court on review. Thus, absent "an enormous abuse of discretion, the trial court's decision should not be disturbed." ***Cabot v. Yarborough,*** 27 Ga. 476 (1859). As stated by the Georgia Court of Appeals in ***Garland v. State of Georgia,*** Supra, 101 Ga. App. at 416:

> "If any doubt exists that the tone of voice or manner of speech used by counsel may be taken into consideration by the court in adjudging him in contempt, this court would hasten to lay such doubt at rest. As was said by Judge MacIntyre in his special concurrance on motion for rehearing in the case of ***White v. State of Georgia,*** 71 Ga. App. 512, 516 (31 S.E. 2d 78) in quoting from 1 Bailey on Habeas Corpus, p. 213, 'Contempt may consist in manner and tone as well as by affirmative act of speech. A court may be insulted by the most innocent words uttered in a peculiar manner or tone. Words used may or may not be contemptuous according to the manner in which they were spoken. The court to which the language is addressed is necessarily, in such a case, the judge in this respect, and its conclusion once formed is conclusive upon every other court.' "

The cases cited by Petitioner in support of his claim that a violation of his constitutional right of speech was violated all involved out of court statements made by non-parties to the litigation or news articles and are certainly not applicable to the instant factual circumstances. ***Wood v. Georgia,*** 370 U.S. 375, 82 S. Ct. 1364 (1962); ***Bridges v. State of California,*** 314 U.S. 252, 62 S. Ct. 252 (1941); ***Pennekamp v. State of Florida,*** 328 U.S. 331, 66 S. Ct. 1029 (1946); ***Craig v. Harney,*** 331 U.S. 367,

67 S. Ct. 1249 (1947).

## IV.

## THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ISSUED BY THE TRIAL COURT CONFORMED TO THE REQUIREMENTS OF GA. CODE ANN §81A-152 AND CONSTITUTE NO VIOLATION OF PETITIONER'S RIGHT OF DUE PROCESS.

The Georgia Court of Appeals correctly held this last argument maintained by Petitioner to be without merit. Ga. Code Ann §81A-152 requires that, with the exception of actions involving uncontested divorce, alimony and custody of minors, in all actions in superior courts tried upon the facts without a jury, the court shall enter its findings of fact and conclusions of law upon which the judgment is based. Code §81A-152 does not set out any specific form or requirements for such findings of fact and conclusions of law. Rather, such findings are sufficient where they inform the appellant of the grounds upon which the judgment was based so as to enable him to complain of and appeal from the judgment rendered and to enable the appellate court to understand the basis of the decision and conclusion of law reached. *Brown v. Brown,* 237 Ga. 201, 227 S.E. 2d 360 (1976); *Doyal Development Co., Inc., v. Blair,* 133 Ga. App. 613, 211 S.E. 2d 642 (1974).

The trial court's June 16, 1978 order clearly sets out findings of fact summarizing the events leading up to the contempt citation, including the incorporation of the entire proceedings before the Court at the contempt hearing (Appendix A, attached hereto). Further, in the Court's conclusions of law adjudging Petitioner in contempt, the Court, noting that it had given consideration to the defense offered by the Petitioner, reduced the 20 day jail sentence to allow 18 of the days to be served on probation upon payment of the $200 fine.

Petitioner's argument that the trial court's judgment is legally insufficient to inform him of the nature of the judgment



entered against him is patently fallacious and totally without merit.

## CONCLUSION

Based upon the foregoing argument and citation of authorities, Respondent William T. Dean respectfully urges this Court to deny Petitioner's application for Writ of Certiorari and to uphold the decision of the Georgia Court of Appeals in the instant action.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing "Response of The Honorable William T. Dean To Petitioner's Writ of Certiorari" upon:

Spencer J. Krupp, Esq.
3179 Maple Drive N.E.
Atlanta, Georgia 30305

by depositing a copy of same in the United Stated Mail in a properly addressed envelope with adequate postage affixed thereon.

This 27 day of Feb., 1980.

ROBERT H. WALLING
DeKalb County Attorney

By:_____
JAMES H. WEEKS
Assistant County Attorney
DeKalb County, Georgia

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## APPENDIX A

MARY ELLEN HARBOLD, NO. 77-716
PLAINTIFF

VS.

HIRSCH FRIEDMAN and DEKALB SUPERIOR COURT
DEBORAH L. BLACKMAN,
DEFENDANTS

## FINDINGS OF FACT

The above-styled case being a suit for damages allegedly caused by a dog bite sustained by the plaintiff on the 15th day of November, 1976, was tried before the Court and a jury on June 7th and 8th, 1978.

The defendant, DEBORAH L. BLACKMAN, filed no defense in the case. The case being in default, the Court permitted the defendant BLACKMAN to contest the question of damages claimed by the plaintiff. The defendant BLACKMAN also testified on cross examination that she lived with the defendant, HIRSCH FRIEDMAN at the time of the incident which was the basis of the suit; that she owned the dog that was alleged to have bitten the plaintiff; that the defendant FRIEDMAN permitted the dog to live in and about the premises with the two named defendants; and that said dog was kept and maintained in the home of HIRSCH FRIEDMAN with his full knowledge and consent at all times.

The defendant HIRSCH FRIEDMAN is, by profession, a licensed practicing lawyer in the City of Atlanta, Georgia; that

near the conclusion of the case and while the defendant HIRSCH FRIEDMAN was on the witness stand being cross examined by Attorney Lawrence S. Burnat, the plaintiff's attorney, the following colloquy between said plaintiff's counsel and the defendant FRIEDMAN occurred:

> "MR. BURNAT: Okay. And, it's still your testimony that you are the only person here today that has spoken the complete truth, that you have heard?
>
> MR. FRIEDMAN: Sir, everyone of your witnesses have lied through their teeth.
>
> MR. BURNAT: That includes Mrs. Webb?
>
> MR. FRIEDMAN: That includes you, sir."

At this point, the Court admonished the witness to respect the Court and counsel and to refrain from such rude, uncivil and disrespectful conduct. The Court further advised the defendant FRIEDMAN that his disrespectful conduct would have the Court's attention at the conclusion of the trial.

At the conclusion of the trial, the Court advised the defendant that he was in contempt of court for the use of such impertinent, disrespectful, rude and insulting behavior. The Court further advised the defendant that any punishment to be meted out by the Court would be after said defendant had an opportunity to present himself with counsel before the Court on June 16, 1978, at which time he would be given an opportunity to present whatever defense of his conduct as he desired.

The defendant appeared before the Court, as ordered, on June 16th, 1978, at 10:00 a.m., and presented his defense, all as will appear from the record attached hereto and by reference made a part of these findings.



## CONCLUSION OF LAW

## JUDGMENT

In consideration of the Findings herein, and giving consideration to the defense offered by the defendant, HIRSCH FRIEDMAN, in explanation of his conduct, the Court finds that the defendant FRIEDMAN was guilty of contempt of Court, and sentences said defendant HIRSCH FRIEDMAN to a term of 20 days in the DeKalb County Jail and the payment of a fine of $200.

Upon the payment of the fine of $200, 18 days of the sentence of 20 days will be served on probation by said defendant.

AND IT IS SO ORDERED THIS THE 16 DAY OF JUNE, 1978.

Sentence stayed for 5 days.

/s/ _____

WM. T. DEAN
Chief Judge, Superior Courts
Stone Mountain Judicial Circuit